

Before the
Administrative Hearing Commission
State of Missouri



DEPARTMENT OF HEALTH & SENIOR
SERVICES,

Petitioner,

vs.

VICKY HARRIS,

Respondent.

No. 13-1479 DH

DECISION

The Department of Health & Senior Services (“DHSS”) has cause to discipline Vicky Harris’ family child care license (“license”) for the following reasons: the premises where Harris conducted her family home child care business were not safe or suitable for the care of children, a pistol on the premises was not stored in a locked cabinet or closet, Harris had failed to have a member of the household screened for child abuse or neglect, failed to have a criminal record of a household member on file, and failed to notify DHSS of new household members, and a person who presented a danger to the health, safety or welfare of the children under Harris’ care was present during hours when child care was being provided.

Procedure

On May 9, 2013, Kathy Quick, Administrator of DHSS’s Section for Child Care Registration, informed Harris by letter that it was revoking her license. On May 22, 2013, Harris

timely appealed the decision to DHSS. On August 16, 2013, DHSS filed a complaint seeking our determination that it had cause to revoke Harris' license.

We held a hearing on January 15, 2014. Rachel Meystedt represented DHSS. Harris appeared *pro se*. This case became ready for our decision on July 14, 2014, when the last written argument was due. Commissioner Sreenivasa Rao Dandamudi, having read the full record including all the evidence, renders the decision.¹

Findings of Fact

1. DHSS issued Harris a license for the period from November 1, 2012 through October 31, 2014.
2. The license issued by DHSS permitted Harris to provide care from 6:00 a.m. to 6:00 a.m. for up to ten children from the ages of six weeks through twelve years with the following additional restrictions:
 - if ten children in care, no more than four children under age two with two adult caregivers;
 - if six children in care, no more than three children under age two with one adult caregiver;
 - if seven to ten children in care, no more than two children under age two with one adult caregiver; and
 - if four or fewer children in care, all could be under age two with one adult caregiver.
3. At all relevant times, Harris provided care for more than four children for compensation in her residence at 1803 Kilrea, St. Louis, Missouri ("the Residence"). The approved child care space in the home was the main floor.

¹ Section 536.080.2; *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App. S.D. 2002). Statutory references are to RSMo 2000 unless otherwise indicated.

Jackie Harris, Devante Smith, and Barrett Ivy

4. On August 23, 2006, August 25, 2008, October 8, 2008, October 27, 2008, July 29, 2010, and August 7, 2012, Harris submitted applications to renew her license.

5. In 2006, Jackie Harris (no relation) and her son, Devante Smith, moved into the Residence.

6. Jackie Harris and Smith continued to live at the Residence at all relevant times.

7. Smith turned 18 years old on April 4, 2012.

8. Harris did not notify DHSS on the renewal applications she filed in 2006, 2008, or 2010 that Jackie Harris had become a household member.

9. On the August 7, 2012 renewal application, Harris notified DHSS that Jackie Harris had become a household member.

10. Harris never notified DHSS in the above-mentioned renewal applications that Smith had become a household member.

11. Harris never obtained a criminal record review² for Smith and did not have such a review on file.

12. Harris failed to have Smith screened for child abuse or neglect.

13. Barrett Ivy was also Jackie Harris' child.

14. Ivy frequently visited the Residence and sometimes stayed overnight on a bed in the basement of the Residence.³

Events of March 5, 2013

15. On or before March 5, 2013, St. Louis County police were notified by a postal inspector that a suspicious package was to be delivered to the Residence. What the inspector

² As the term is used in 19 CSR 61.105(1)(L).

³ Ivy's age was not given and is not relevant to this case since he did not reside there.

found suspicious about the package was that it was addressed to a person who had not received mail at the Residence address before.

16. On March 5, 2013, a neighborhood enforcement team of the St. Louis County Police Department, including Officer Tom Noonan, set up surveillance outside the Residence to observe the delivery of the package.

17. Officer Noonan had 24 years' experience as a police officer, had participated in a police department drug unit, and had attended a Drug Enforcement Administration narcotics school.

18. At approximately 11:30 a.m. on March 5, 2013, when child care was being provided, the package was delivered to the Residence and signed for by Lisa Baines, one of Harris' child care employees. At Ivy's request, Baines then placed the package underneath the steps leading from the main floor of the residence to its basement.

19. About 20 minutes later, Ivy came to the Residence. When he did, police approached him. He told them that he knew a package had been delivered to the Residence, but he claimed not to know its contents and denied he had anything to do with it.

20. Harris and Baines then came out of the Residence.

21. Harris, Baines, and Officer Noonan entered the Residence and retrieved the package from the basement, which was addressed to Montay Jordan.

22. Harris did not know who Montay Jordan was.

23. Noonan directed Harris to open the package, which Harris did. The package contained 4-5 pounds of marijuana.⁴

24. Harris consented to a police search of the Residence.

⁴ See "Did the Package Delivered to the Residence on March 5, 2013 Contain Marijuana?" below.

25. During the search, the police discovered a pistol belonging to Ivy under a mattress in the basement bedroom where Ivy sometimes slept.

26. Ivy was arrested.

27. Before Noonan came to the Residence, Harris was unaware that the marijuana and the pistol were in her basement.

28. As a result of the arrest, charges were filed against Ivy, but were later dismissed.⁵

Subsequent Inspection of the Residence

29. On March 11, 2013, Shirley Ellis, a Child Care Facility Specialist for DHSS, conducted an unannounced inspection of the Residence.

30. During the inspection, Harris told Ellis that there was marijuana on the premises on March 5, 2013.

Evidentiary Issue

*Did the Package Delivered to the Residence
on March 5, 2013 Contain Marijuana?*

DHSS alleges that the package delivered to the Residence on March 5, 2013 contained marijuana. In support of this allegation, it cites the May 9, 2013 letter Quick sent to Harris revoking Harris' license,⁶ its "Substantiated Complaint of Statute or Rule Violations" prepared by Shirley Ellis,⁷ and Noonan's and Ellis' testimony. As it turns out, however, both of the exhibits and Ellis' testimony consist entirely of hearsay on the matter. Specifically, Quick's May 9, 2013 revocation letter to Harris quoted Harris as saying that "[she] didn't know what [the package] was and the police said it was marijuana."⁸ The letter also quoted Officer Noonan as

⁵ Tr. 37. This disclosure was made only after Commissioner Mary Nelson asked Ellis about the outcome of Ivy's criminal case.

⁶ DHSS Ex. B.

⁷ DHSS Ex. H.

⁸ DHSS Ex. B, p. 2.

saying “[the package contained] marijuana.”⁹ Ellis’ substantiated complaint quoted Harris as saying, “the police said [the package contained] marijuana,”¹⁰ and Ellis testified that Harris had told her during Ellis’ inspection of the Residence on March 11, 2013 that police had found marijuana in the Residence.¹¹ Harris did not object to the introduction of any of this evidence.

While hearsay evidence in the record can and must be considered in administrative hearings when no objection is made,¹² § 536.070(8)¹³ only requires that we *consider* such evidence. In this case, we give the exhibits and Ellis’ testimony little weight regarding the presence of marijuana in the Residence due to their obvious hearsay character.

Officer Noonan’s testimony, on the other hand, is not hearsay (he saw the marijuana) and has the weight of authority. He had 24 years’ experience as a police officer, had participated in a police department drug unit, and had attended a DEA school in narcotics. However, he testified that he *believed* the material in the box to be marijuana, and he was not aware of the results of any tests performed on the material.¹⁴

Nonetheless, the fact that Noonan stated only his belief that the material was marijuana does not defeat DHSS’s allegation that it was marijuana. “Opinions or belief on questions of identity of persons or things, when such opinion or belief rests upon facts within the witness’s own knowledge, is competent evidence, although the witness will not swear positively to identity of the person or thing.”¹⁵ Furthermore, a police officer may identify a leafy substance as

⁹ *Id.* p. 5.

¹⁰ DHSS Ex. H, p. 3.

¹¹ Tr. 20.

¹² *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 736 (Mo. App. S.D. 2004) (citing *Dorman v. State Bd. of Regis’n for the Healing Arts*, 62 S.W.3d 446 (Mo. App. W.D. 2001)).

¹³ RSMo Supp. 2013.

¹⁴ Tr. 12.

¹⁵ *Wise v. Standard Oil Co. of Indiana*, 198 S.W.2d 1014 (Mo. App. K.C.D. 1947); *see also State v. Johnson*, 286 S.W.2d 787, 791 (Mo. 1956) (identification of a thing need not be wholly unqualified in order to make evidence admissible).

marijuana based on his practical experience and training.¹⁶ Accordingly, we find that the material in the box delivered to the Residence contained marijuana.

Conclusions of Law

Section 210.221.1(2) gives DHSS the authority to “deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the [D]epartment[.]” DHSS filed a complaint with this Commission after Harris requested a hearing to appeal DHSS’s decision to revoke her license. Section 210.245.2 provides our jurisdiction to hear this case. We determine whether there is cause to discipline a license; the decision as to the appropriate disciplinary action is reserved to the licensing agency.¹⁷

DHSS has the burden of proof to establish by a preponderance of the evidence that there is cause to revoke Harris’ license.¹⁸ A preponderance of the evidence is “that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.”¹⁹ This burden is met by producing substantial evidence of probative value or by the inferences reasonably drawn from such evidence.²⁰

Regulatory scheme for licensing of family child care homes

DHSS is a state agency created under § 192.005,²¹ and vested with the authority to license and regulate child care facilities under §§ 210.201 through 210.259. Specifically, the following powers and duties are granted to DHSS under § 210.221.1:

¹⁶ *State v Gasperino*, 859 S.W.2d 719, 721 (Mo. App. W.D. 1993).

¹⁷ Section 621.110, RSMo. Supp. 2013.

¹⁸ See *Kerwin v. Missouri Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012).

¹⁹ *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

²⁰ *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

²¹ RSMo Supp. 2013.

(1) After inspection, to grant licenses to persons to operate child-care facilities if satisfied as to the good character and intent of the applicant and that such applicant is qualified and equipped to render care or service conducive to the welfare of children, and to renew the same when expired. No license shall be granted for a term exceeding two years. Each license shall specify the kind of child-care services the licensee is authorized to perform, the number of children that can be received or maintained, and their ages and sex;

(2) To inspect the conditions of the homes and other places in which the applicant operates a child-care facility, inspect their books and records, premises and children being served, examine their officers and agents, deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the department of health. The director also may revoke or suspend a license when the licensee fails to renew or surrenders the license;

(3) To promulgate and issue rules and regulations the department deems necessary or proper in order to establish standards of service and care to be rendered by such licensees to children. . . .; and

(4) To determine what records shall be kept by such persons and the form thereof, and the methods to be used in keeping such records, and to require reports to be made to the department at regular intervals.

DHSS, therefore, has the power to discipline a licensee for violating the regulations promulgated by DHSS.

Safe and Suitable for the Care of Children

19 CSR 30-61.085(1)(A)²² states: “The premises shall be safe and suitable for the care of children.” “Premises” is defined by 19 CSR 30-61.010(17) as “a house(s), dwelling(s) or building(s) and its adjoining land.” By that definition, “premises” has a broader scope than just the approved child care space (the first floor of the Residence); it includes the basement, where the marijuana and pistol were found. “Suitable” is defined as “appropriate from the viewpoint

²²All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

of propriety, convenience, or fitness.”²³ “Safe” is defined as “secure from threat of danger, harm, or loss : not exposed to danger.”²⁴ DHSS argues that Harris’ family child care home was not safe or suitable for the care of children because marijuana and an unsecured pistol were found on the premises.

It buttresses its argument by asserting that Ivy “had a criminal history” and was charged with possession of marijuana with intent to distribute after the marijuana was found. However, DHSS produced no evidence of any prosecution or conviction of Ivy except for Officer Noonan’s unsubstantiated testimony about the charges (and did not disclose that the charges had been dropped until the hearing), nor did it present any evidence of Ivy’s alleged prior criminal history. Thus, we only consider the marijuana and firearm issues.

We conclude that the presence of 4-5 pounds of marijuana on the premises rendered them inappropriate, and therefore unsuitable, for children. Also, the presence of an unsecured firearm on the premises rendered them unsafe for children. Neither Harris’ intent to keep the premises safe for the children under her care, her love of those children, nor her ignorance of the presence of the marijuana and pistol on the premises matters under this regulation, which is written as a strict liability law— a violation occurs when an unsafe or unsuitable condition exists on the premises. Therefore, Harris’ license is subject to discipline for violating 19 CSR 30-61.085(1)(A) because the premises were unsafe and unsuitable for the care of children.

Pistol Not Stored in Locked Cabinet or Closet

19 CSR 30-61.085(1)(K) provides, “Ammunition, pistols, hunting knives, bows and arrows or other weapons shall be stored in a locked cabinet or locked closet.” In this case, Ivy’s pistol was not secured in either one. Harris’ defense that she was unaware Ivy kept a pistol on the premises does not excuse the violation because the regulation does not depend on the

²³ WEBSTER’S THIRD NEW INT’L DICTIONARY 2286 (unabr. 1986).

²⁴ *Id.* at 1998.

provider's knowledge of a pistol being on the premises, nor should it; a child is no more safe when an unsecured firearm is on the premises with the provider's knowledge than when the provider does not know it is there. Therefore, Harris' license is subject to discipline for violating 19 CSR 30-61.085(1)(K).

Failure to Screen Household Member for Child Abuse or Neglect

19 CSR 30-61.105(1)(K) provides, in relevant part, that "the provider, other household members, and other child care personnel shall be screened for child abuse/neglect." In this case, DHSS alleged that Harris failed to obtain such screenings for Devante Smith. The allegation necessarily includes a requirement that Smith was a "household member" for purposes of the regulation.

The term "household member" is defined neither in Chapter 210 RSMo nor 19 CSR Chapter 61. DHSS proposes no definition of the term, but merely states that it "considered [Smith] to be [a] member of the household" without explaining why.

When there is no statutory definition, we may look to the dictionary for the plain and ordinary meaning of a term.²⁵ We found no definition of "household member," but did find a relevant definition of "household," as

Those who dwell under the same roof and comprise a family : a domestic establishment, specif. : a social unit comprised of those living together in the same dwelling place."^{26]}

Black's Law Dictionary defines "family" as either "a family living together" or "a group of people who dwell under the same roof."²⁷ Smith lived in the Residence since 2006 with his mother and Harris, and was therefore a household member. Harris never obtained a child

²⁵ *St. Louis Police Ofcs.' Ass'n v. Board of Police Comm'rs of City of St. Louis*, 259 S.W.3d 526, 528 (mo banc 2008).

²⁶ WEBSTER'S THIRD NEW INT'L DICTIONARY 1096 (unabr. 1986).

²⁷ 9th ed. 808.

abuse/neglect screening for Smith. Therefore, Harris' license is subject to discipline for violating 19 CSR 30-61.105(1)(K).

Failure to Request and Have on File a Criminal
Record Review for Household Members

19 CSR 30-61.105(1)(L) provides in relevant part:

The child care provider shall request and have on file the results of a criminal record review from the Missouri State Highway Patrol as defined by 19 CSR 30-61.045 Initial Licensing Information and 19 CSR 30-61.055 License Renewal. This shall include the results of a criminal record review from the Missouri State Highway Patrol for the child care provider, all persons employed by the child care provider, and all adult household members. The child care provider shall request a criminal record review within ten (10) days following the employment of any person and within ten (10) days after any adult becomes a household member. The department may request a criminal record review for any adult present in the family day care home when child care children are present. The criminal record reviews shall include records of criminal convictions, pending criminal charges, and suspended imposition of sentence during the term of probation. Requests for criminal record reviews shall be made on a form provided by the highway patrol.

* * *

3. Information received by the provider shall be retained in the individual's file in a confidential manner.

In this case, Harris did not have a criminal record review on file for Smith, who turned 18 on April 4, 2012. Therefore, her license is subject to discipline for violating 19 CSR 30-61.105(1)(L).

Failure to Notify DHSS of New Household Members

19 CSR 30-61.115(4) provides: "The provider shall notify the department of any new household members." DHSS's license renewal application form requires a provider to list all

household members.²⁸ As we discuss above, “household members” include people who dwell under the same roof, such as Smith. For the same reason, Jackie Harris was also a household member.

Harris completed and submitted renewal forms in 2006, 2008, 2010, and 2012. She did not list Jackie Harris as a household member on the 2006, 2008, and 2010 forms, but did list her on the 2012 form. Although Smith lived in the Residence starting in 2006, Harris never listed him as a household member on any of the forms. Therefore, her license is subject to discipline for violating 19 CSR 30-61.115(4).

Person in Home Who Was a Threat to
Children’s Health, Safety and Welfare

19 CSR 30-61.115(5) provides: “Any household member or any person present at the home during hours in which child care is provided shall not present a threat to the health, safety or welfare of the children.” DHSS alleges that Ivy, a person present at the Residence on March 5, 2013 when child care was provided, was a threat to the health, safety, and welfare of the children in the Residence because he kept a pistol in the basement and he received a package of marijuana on that day.²⁹ We agree. Ivy kept a pistol on the premises and had a connection with a significant amount of marijuana being delivered to the premises.

DHSS also alleges that Harris “directly violated” 19 CSR 30-61.115(5) because she allowed Ivy’s presence at the Residence during child care hours, and that Harris knew that Ivy “had been in trouble with the police in the past.”³⁰ We disagree. Whether she knew of his prior police contacts or not, she did not know him to be a threat to the health, safety and welfare of the children. Therefore, her knowledge (if any) of Ivy’s prior troubles with the police is immaterial.

²⁸ DHSS Exs. D-G.

²⁹ DHSS brief p. 10.

³⁰ *Id.*

However, the presence of the pistol and the marijuana on the premises leads us to conclude that Ivy was a threat to the health, safety, and welfare of the children under Harris' care. Therefore, Harris' license is subject to discipline for violating 19 CSR 30-61.115(5).

Summary

There is cause to discipline Vicky Harris' family child care home license.

SO ORDERED on October 14, 2014.

\s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner